

Date: November 22, 1996

Case No.: 95-INA-00149

In the Matter of:

RIDGE PRECISION PRODUCTS, INC.,
Employer

On Behalf Of:

JOSE VICENTE CASSETTA,
Alien

Appearance: Stefanie M. Incao, Esq.
For the Employer/Alien

Before: Huddleston, Holmes, and Neusner
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(14) of the Immigration and Nationality Act of 1990, 8 U.S.C. § 1182(a)(14) (1990) ("Act"). The certification of aliens for permanent employment is governed by § 212(a)(5)(A) of the Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656, of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(14) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,¹ and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On August 19, 1992, Ridge Precision Products, Inc. ("Employer"), filed an application for labor certification to enable Jose Vicente Cassetta ("Alien") to fill the position of Machine Technician/Machine Operator (AF 3-4). The job duties for the position are:

Set up lathes and milling machines with CNC programming in order to operate machines. Perform tool grinding operations. Be able to test for hardness of metals; set up tooling, write test and analyze programs.

The requirements for the position are four years of high school, technical school studying machine mechanics, one year of training as a machine operator, and three years of experience in the job offered or in the related occupation of machinist. Other Special Requirements are:

Technical high school diploma specializing in machine operations and technology of machine operations (4 years), trigonometry and mechanical drafting, CNC programming (1 yr.), and metric system of weights & measures.

The CO issued a Notice of Findings on June 6, 1994 (AF 90-95), proposing to deny certification. First, the CO determined that the Employer's Educational Requirement and Special Requirements are unrealistic and restrictive. Second, the CO found that the Employer apparently trained the Alien for this position and must, therefore, fully document why it is not feasible for him to train someone else at this time in the absence of providing evidence which clearly shows that the Alien had the required qualifications at the time of his hire, or reducing the requirements to that which the Alien had at the time of his hire. Third, the CO stated that three U.S. applicants appear to be qualified based on the normal requirements of the position, and were rejected for reasons that are not lawful or job related.

Accordingly, the Employer was notified that it had until July 11, 1994, to rebut the findings or to cure the defects noted.

¹ All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

The Employer submitted its rebuttal dated July 5, 1994, under cover letter dated July 7, 1994 (AF 96-132). The Employer contended that the stated requirements are necessary to the job because “the work put out by Ridge Precision Products require[s] an employee to have three years experience, technical high school diploma in machine operations and technology, trigonometry [sic] and mechanical drafting, CNC programming, and knowing the metric system of weights and measures.” The Employer also stated that the work volume has grown considerably since the Alien was first hired, the training is done by the President of the Company on a one-to-one basis, and depending on the experience of the worker, can take several months or up to one year. The Employer finally contended that the recruiting was done in good faith, “even for the position which the alien now holds with Ridge. Since the time of the filing of the Form 750A and B with the Labor Department in New Jersey, every effort is made to hire only qualified U.S. workers, and three have been hired. We have had to train for a short period of time, two of the employees.”

The CO issued the Final Determination on July 19, 1994 (AF 133-137), denying certification because the Employer failed to rebut § 656.21(b)(2), which requires an employer to document that his requirements for the job opportunity, unless adequately documented as arising from business necessity, are those normally required for the performance of the job in the U.S. and as defined for the job in the *Dictionary of Occupational Titles* (“D.O.T.”). Additionally, the Employer failed to rebut § 656.21(b)(5), which requires an employer to document that his requirements for the job opportunity are the minimum necessary for the performance of the job, and that the employer has not hired, and it is not feasible for the employer to hire, workers with less training and/or experience. Next, the CO found that the Employer failed to rebut § 656.21(j), which provides that an employer shall submit a written report of the results of all post-application recruitment efforts during the 30-day recruitment period. The CO determined that the rejection of one U.S. applicant remains at issue, and found that the Employer failed to document that he rejected a U.S. worker for lawful reasons.

On August 19, 1994, the Employer requested review of the Denial of Labor Certification (AF 138-171). On November 25, 1994, the CO forwarded the record to this Board of Alien Labor Certification Appeals (“BALCA” or “Board”).

Discussion

Section 656.21(b)(2) proscribes the use of unduly restrictive job requirements in the recruitment process. The reason unduly restrictive requirements are prohibited is that they have a chilling effect on the number of U.S. workers who may apply for or qualify for the job opportunity. The purpose of § 656.21(b)(2) is to make the job opportunity available to qualified U.S. workers. *Venture International Associates, Ltd.*, 87-INA-569 (Jan. 13, 1989) (*en banc*). Where an employer cannot document that a job requirement is normal for the occupation or that it is included in the *Dictionary of Occupational Titles* (“DOT”), or where the requirement is for a language other than English, involves a combination of duties, or is that the worker live on the premises, the regulation at § 656.21(b)(2) requires that the employer establish the business necessity for the requirement.

To establish business necessity, the two-prong standard of *Information Industries*, 88-INA-82 (Feb. 9, 1989) (*en banc*) is applicable. To satisfy the first prong, the Employer must show that the requirement bears a reasonable relationship to the occupation in the context of the employer's business. The second prong focuses on whether the requirement is essential to performing, in a reasonable manner, the job duties as described by the employer.

In the instant case, the CO correctly found that the Employer's Special Requirements were unduly restrictive as they are not normally required for the position of Machinist under the guidelines of the DOT. The CO notified the Employer that it must establish the business necessity for the Special Requirements by addressing the following issues: (1) define and document each of the Special Requirements listed or referred to; in the case of the educational requirement, document U.S. high schools that offer the diploma and technology required; (2) include projects on which these special skills will be used and the percentage of time spent on each; (3) document that it is normal for the Employer and for your industry to require all of the skills listed in one person; and, (4) list the number of current and past employees who possess all of the skills and all of the individuals hired for this same position.

The Employer's rebuttal submission included the following undocumented statements by the Employer.

The requirements are necessary to the job because the work put out by Ridge Precision Products require an employee to have three years experience, technical high school diploma in machine operations and technology, trigonometry [sic] and mechanical drafting, CNC programming, and knowing the metric system of weights and measures.

The Employer asserted that knowledge of the metric system is necessary because the specifications for an order come to Ridge Precision Products drawn in millimeters and centimeters. Further, the Employer asserted that a majority of orders are for overseas clients, where the metric system is the only system used. With regards to the trigonometry and mechanical drafting requirement, the Employer stated that this is necessary when customers require the design of specific machine parts. However, the CO correctly pointed out that designing machine parts is not one of the duties listed for this position. The Employer failed to document or define the remaining special requirement of CNC programming. The Employer did assert, without supplying any supporting documentation, that there are technical vocational high schools in New Jersey that offer courses in machine shop and machine operations, as well as many community colleges which offer non-credit courses in these fields.

The Employer rebutted the CO's second request merely by stating that "it is difficult to define the percentage of time spent on each project" and noting that the time on a particular project may vary widely.

The Employer's rebuttal of the third request made by the CO consisted merely of the statement that "it is normal to require these skills in one person for the reasons stated above."

Although a written assertion constitutes documentation that must be considered under *Gencorp*, 87-INA-659 (Jan. 13, 1988) (*en banc*), a bare assertion without supporting reasoning or evidence is generally insufficient to carry an employer's burden of proof. For example, *Inter-World Immigration Service*, 88-INA-490 (Sept. 1, 1989) (citing *Tri-P's Corp.*, 88-INA-686 (Feb. 17, 1989)) found that unsupported conclusions (*i.e.*, statements without explanation or factual support) are insufficient to demonstrate that certain job requirements are normal for a position or supported by a business necessity. Furthermore, an employer's failure to produce documentation reasonably requested by the CO will result in a denial of labor certification. *John Hancock Financial Services*, 91-INA-131 (June 4, 1992).

As outlined above, the Employer in this case has offered only written assertions as to the business necessity of some of the Special Requirements. Therefore, we find that the Employer in this case has not sufficiently documented the business necessity of the Special Requirements as requested by the CO.

Section 656.21(b)(5) prohibits an employer from requiring more stringent qualifications of a U.S. worker than it requires of an alien, thus treating an alien more favorably than it would a U.S. worker. *ERF Inc., d/b/a/ Bayside Motor Inn*, 89-INA-105 (Feb. 14, 1990). Section 656.21(b)(6) requires an employer to document that his requirements for the job opportunity are the minimum necessary for the performance of the job and that he has not hired or that it is not feasible for him to hire workers with less training and/or experience.

In this case, the Employer indicated that all of the Special Requirements are required for the performance of the job. However, the CO noted in the NOF that the Alien had no CNC experience or training in this occupation prior to his employment with this Employer, and the Alien does not document that he has trigonometry and mechanical drafting. Thus, the CO also asked the Employer to document why it is not feasible to train a U.S. worker. Specifically, the Employer was asked to indicate the following: (1) how many machinists were employed at the time the Alien was trained; (2) how many are now employed; (3) who trained the Alien; (4) change in total work force and annual financial volume of the business from the time Alien was hired and trained until present; and, (5) why a company that has expanded considerably since the Alien was trained has not proportionately developed the ability to train now, as is customary with growth and development.

The Employer's rebuttal stated that the Alien was trained in CNC programming by the President of the Company and that the work situation has changed considerably in that work hours have been expanded and, as such, it is more advantageous to operate with expanded hours and highly skilled employees, with no time down, no accidents, no rejects. The Employer stated that at the time the Alien was hired there were four employees with varying degrees of skills, and since that time three more workers were hired, one of which needed training and subsequently crashed a machine costing several thousand dollars. The Employer did not document the annual financial volume of business at present, as opposed to the time the Alien was hired, as directed by the CO.

An employer violates § 656.21(b)(5) if it hires an alien with lower qualifications than it is now requiring and has not documented that it is now not feasible to hire a U.S. worker without

that training or experience. *Capriccio's Restaurant*, 90-INA-480 (Jan. 7, 1992); *Office-Plus, Inc.*, 90-INA-184 (Dec. 19, 1991); *Gerson Industries*, 90-INA-190 (Dec. 19, 1991); *Rosiello Dental Laboratory*, 88-INA-104 (Dec. 22, 1988). An employer must sufficiently document a change in circumstances to demonstrate infeasibility. See *Rogue and Robelo Restaurant and Bar*, 88-INA-148 (Mar. 1, 1989) (*en banc*). The employer's burden of establishing why it is not now feasible to offer the same favorable treatment to U.S. applicants has been characterized as heavy. *58th Street Restaurant Corp.*, 90-INA-58 (Feb. 21, 1991); *Finger, Faces, and Toes*, 90-INA-37 (Feb. 1, 1991). Moreover, an increase in the volume of business or general growth and expansion, by itself, is insufficient to establish infeasibility. Unless an employer proves otherwise, increased training capability is presumed to accompany growth. See *Super Seal Manufacturing Co.*, 88-INA-283 (Apr. 8, 1991) (*en banc*); *AEP Industries*, 88-INA-415 (Apr. 4, 1989) (*en banc*); *Anderson-Mraz Design*, 90-INA-142 (May 30, 1991). Establishing infeasibility to train requires more than an assertion of growth in business or difficulty or inconvenience to the employer. *Montran Corp.*, 90-INA-300 (Jan. 8, 1992). See also, *Borrelli Bros., Inc.*, 93-INA-62 (Jan. 25, 1994); *Celini P.V.C.*, 92-INA-233 (May 28, 1993); *Highland Plating Co.*, 92-INA-264 (May 25, 1993); *Newcastle Fabrics Corp.*, 92-INA-305 (May 4, 1994).

Therefore, we find that the Employer's unsupported assertions that business is expanding, as outlined above, do not properly document that it is infeasible to train a U.S. worker.

It should be noted that the Employer included in the motion for reconsideration of the Final Determination additional evidence regarding the Alien's training. However, evidence first submitted with the request for review will not be considered by the Board. *Capriccio's Restaurant, supra*; *Kelper International Corp.*, 90-INA-191 (May 20, 1991); *Kogan & Moore Architects, Inc.*, 90-INA-466 (May 10, 1991).

Because we find that the Employer in this case has failed to provide sufficient documentation supporting the business necessity of the Special Requirements for the job opportunity, as well as the infeasibility to train U.S. workers, the issue of whether the Employer provided a good-faith recruitment effort is moot. Accordingly, we affirm the CO's denial of labor certification in this case.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered this the _____ day of November, 1996, at Cincinnati, Ohio.

RICHARD E. HUDDLESTON
Administrative Law Judge

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except: (1) when full Board consideration is necessary to secure or maintain uniformity of its decision; and, (2) when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

*Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002*

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.